

ESSAY

SECRETS AND LIES: THE INTELLIGENCE COMMUNITY'S “DON'T ASK, DON'T TELL”

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I. INTRODUCTION

The issuance and integrity of our nation’s security classifications is of obvious importance. Intelligence agencies within the United States must naturally be very careful about how they execute this power to allow access to the nation’s secrets, for even in this post-Cold War period we now live in, the ever-present threat of foreign nations (and, increasingly, stateless organizations) requires the United States to remain ever-vigilant in the protection of democracy. The intelligence community uses several different systems and procedures to determine which persons may be trusted with top-secret clearances, but many agencies share a peculiar restriction in common. The CIA, the FBI, and the armed forces all have excluded homosexuals from the pool of patriotic citizens who qualify for the important task of safeguarding our nation’s secrets.

This restriction is the result of a multitude of concerns—the reliability of persons who until recently were well known to flagrantly violate the laws of the several states, disputes over potential mental and medical conditions once believed to be inimical to homosexuality, and a recognition that a person’s fear of the disclosure of his homosexuality to his family or community may leave him susceptible to blackmail—all enter into the calculations of the intelligence community. But the countervailing progress of society and the lack of clear certainty over both the effectiveness of this ban and the wisdom of its justifications are leading many to question the continued existence of such regulations. Growing differences between courts on the federal and state levels, as well as between the federal circuits, over the place of homosexuals in society and their place in the rubric of equal protection (whether homosexuals remain a non-suspect class or have “graduated” to either the semi-suspect or suspect classifications), in addition to a strong push for the invalidation or repeal of the “Don’t Ask, Don’t Tell” policy, will surely force the issue upon the courts at some point in the very near future.

Therefore, the implications of this ban, the reasons for its continued existence, and the future of intelligence in a world that is constantly changing on both domestic and foreign fronts demand a thorough review of these restrictions. The traditional role of courts in reviewing the employment-related decisions of any executive agency must be examined and applied to the special circumstances our subject presents. Addition-

ally, courts face legitimate questions as to the status of homosexuals in the intelligence community and in wider society. Such constitutionally based concerns over restricting homosexuals from gaining security clearances and our nation's (and courts') increasing acceptance of homosexuality demand that these issues be revisited and more fully addressed. Also necessary is a review of this policy's most publicly known restriction: the "Don't Ask, Don't Tell" policy,¹ which the Obama administration and Congress may significantly modify or eliminate in the very near future.² Finally, the changing nature of intelligence in the twenty-first century creates new demands and new vulnerabilities for which this country must be prepared.

II. THE PROBLEM PRESENTED

There are many examples of an irrational, blind hatred of homosexuals existing at all levels of the federal system, even in the present day.³ Historically, however, the main intelligence services of the United States—the CIA, FBI, and the various branches of military intelligence—have been the least hospitable to homosexual employees who only want to serve their country.⁴ The history of the active exclusion of homosexuals from employment in these agencies and the fact that these restrictions were given the force of law may be part of the reason for this hostility.⁵

1. 10 U.S.C. § 654(b) (2006).

2. Indeed, the situation vis-à-vis "Don't Ask, Don't Tell" continues changing daily. Military Readiness Enhancement Act of 2010, S. 3065, 111th Cong. (2d Sess. 2010), *available at* http://lieberman.senate.gov/assets/pdf/DADT_Bill.pdf. Compare News Release, Dep't of Defense, Statement by Army Sec'y John McHugh (Apr. 1, 2010), *available at* 2010 WLNR 6906771 (stating that Secretary Gates had effectively put a moratorium on "Don't Ask, Don't Tell" prosecutions), with Anne Flaherty, *Army Says Gays Still Can Face Dismissal Secretary Backtracks, Says There's No Ban on Discharges During 'Don't Ask' Review*, HOUSTON CHRON., at A17 *available at* 2010 WLNR 7063540 ("Reversing course, Army Secretary John McHugh warned soldiers Thursday they still can be discharged for acknowledging they are gay, saying he misspoke earlier.").

3. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (acknowledging a "moral opprobrium that has traditionally attached to homosexual conduct").

4. *Job Anxiety—Gays with a Government Job*, ORLANDO SENTINEL, July 15, 1991, at A5, *available at* 1991 WLNR 4068850. For example, one man who had worked for the FBI for twenty years was fired for admitting that he was gay. *Id.* Another woman settled a suit with the CIA after she accused the organization of refusing to grant her security clearance because she was a lesbian. *Id.* The CIA, in turn, explained that it "considers homosexual or heterosexual conduct in security clearance decisions if it reflects on a person's stability, indicates a personality disorder or could subject the person to pressure or coercion." *Id.*

5. See *Lawrence*, 539 U.S. at 575 (examining previous cases that facilitated the statutory banning of homosexual activity in civilian life, explaining that "[w]hen homosexual conduct is made criminal by the law of the [s]tate, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres").

The most common way non-military intelligence agencies denied security clearance to homosexuals (the statutory requirement that clearance recipients demonstrate no "sexual perversion") is still in effect today.⁶

Military agencies must follow what may be the most well-known statutory restriction on the employment of homosexuals in potentially sensitive situations: the United States military's "Don't Ask, Don't Tell" policy, which remains in effect today and severely impacts military intelligence services.⁷ Like other similar provisions, it fails to proffer any particular justification for the exclusion of homosexual employees, citing only an "unacceptable risk" of derogatory effects upon our nation's military.⁸ This lack of specificity is one of the many factors that have engendered continuing debate on the wisdom of the policy and numerous calls for the Obama administration to overturn it.⁹

The Supreme Court's recent decision in *Lawrence v. Texas* has further spurred these already numerous calls,¹⁰ and the constant pressure on the administration has now led to the most powerful and sustained attempt to overturn laws that discriminate against homosexuals. In the present legislative session, a bill has been proposed to replace "Don't Ask, Don't Tell" with a sexual orientation non-discrimination policy for the mili-

6. Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 409 (1973). Homosexuals were often denied security clearance based on their professed "sexual perversion." *Id.*; see also 32 C.F.R. § 154.7(q) (2009) (requiring that "[a]cts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society" are to be considered when examining potential eligibility for a security clearance).

7. 10 U.S.C. § 654(b) (2006).

8. *Id.* § 654(a)(14)–(15). Indeed, the statute alludes to the fact that the military requires its service members to live and work in "conditions that are often [S]partan, primitive, and characterized by forced intimacy with little or no privacy." *Id.* § 654(a)(12). Without actually explaining why the presence of homosexuals would make those conditions even harder to suffer, the statute goes on to say that there has been a longstanding history in military law of banning homosexuals from service. *Id.* § 654(a)(13). The statute also insists that the military must maintain policies that prevent from serving those who threaten the "morale, good order and discipline, and unit cohesion that are the essence of military capability." *Id.* § 654(a)(15).

9. *NPR Morning Edition: Will Obama Press for End of 'Don't Ask, Don't Tell'?* (NPR radio broadcast Dec. 22, 2008) (transcript available at 2008 WLNR 24542180). Those calling for this review include General Colin Powell; high-ranking military officials in the Army and Navy, such as Retired Rear Admiral Jamie Barnett; and members of the House of Representatives, including Representative Barney Frank. *Id.*

10. See *Lawrence*, 539 U.S. at 579 (reversing a Texas state court decision upholding a state sodomy ban).

tary.¹¹ It is important to note that the bill had 192 co-sponsors, over one-quarter of the House, as of April 2010.¹²

In 1995, President Clinton issued an executive order that purported to bar the intelligence community from refusing to issue security clearances based solely on sexual orientation.¹³ The order is less permanent than a legislative enactment, however, and it contains several exemptions that render it mostly ineffective.¹⁴ Additionally, the fact that subsequent administrations can repeal these orders renders them transitory at best and forever insecure.¹⁵ Indeed, President Clinton's executive order preempted an earlier order from President Eisenhower that implicitly labeled homosexuality as a "sexual perversion."¹⁶ It should be obvious that one's entire career and livelihood will be forever uncertain and dangerously prone to political and societal trends if assured only by virtue of an easily repealed executive order.

Because "Don't Ask, Don't Tell" and other restrictions remain on the books, they may only truly be put to rest through legislative or judicial action. Indeed, courts have recognized that discriminatory laws negatively affect citizens well past that time when they were justified by national security concerns, dubious though those concerns may have been.¹⁷

11. Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009), available at http://lieberman.senate.gov/assets/pdf/DADT_Bill.pdf. The proposed bill would explicitly proscribe the Armed Services from discriminating "on the basis of sexual orientation," including taking any action regarding current personnel or potential recruits. *Id.* § 4. A broad definition is provided for what constitutes "sexual orientation," which encompasses heterosexuality, homosexuality, and bisexuality, and applies whether one's sexual orientation is "real or perceived." *Id.*

12. H.R. 1283: Military Readiness Enhancement Act of 2009 (GovTrack.us), <http://www.govtrack.us/congress/bill.xpd?bill=h111-1283> (last visited Apr. 25, 2010).

13. Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,250 (Aug. 2, 1995).

14. Christopher Scott Maravilla, *Judicial Review of Security Clearances for Homosexuals Post-U.S. Department of the Navy v. Egan*, 13 ST. THOMAS L. REV. 785, 786 (2001).

15. *Id.*

16. Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (requiring investigation personnel to collect information on any individual who, among other things, demonstrated any "sexual perversion"). President Clinton's 1995 Executive Order, however, "rescinded a directive dating from the Eisenhower administration that classified homosexuality as a sexual perversion and said it was automatic grounds for denying a clearance." *At the CIA, Being a Gay Employee Is No Longer a Cloak-and-Dagger Matter*, HOUSTON CHRON., June 10, 2000, at A6, available at 2000 WLNR 9363731.

17. See, e.g., *Buttino v. FBI*, 801 F. Supp. 298, 302 (N.D. Cal. 1992) ("[T]he historical reality that 'national security' has frequently been asserted as the ostensible justification for sweeping deprivations of equal protection which, with hindsight, are nearly universally condemned and readily regarded as, at best, grossly disproportionate to the national security concerns at one time asserted as justifications."). The court cites *Korematsu v. United States* as an example. *Id.* at n.5 (citation omitted).

No less a noted jurist than Justice Scalia is quite correct in his assertion that *Lawrence* represents and requires a sea change in a great many policies, surely including the anti-homosexual policies still on the books for the intelligence community, both civilian and military.¹⁸ In his dissent from *Lawrence*, Justice Scalia unintentionally provided a new and helpful three-part test for overruling Supreme Court decisions and outdated legislation and executive orders.¹⁹ The still extant restrictions on homosexual involvement in both civilian and military intelligence communities are primed for judicial preemption under the Scalia Test: both have had their foundations “eroded” (if not totally destroyed) by subsequent decisions in *Romer* and *Lawrence*; both have been the subject of a great deal of “substantial and continuing criticism”; and both have not induced “individual and societal reliance” that can counsel against the gains to our national security and the restoration of homosexuals’ dignity that such a judicial action would afford.²⁰

Even today, it is interesting to note some of the names attached to actions in this area of litigation; these are people who have reached the apex of political power in recent years. Thus, the implications of this issue remain relevant today, and a healthy concern for the impartiality of government officials is certainly warranted.²¹ Defense Secretary Robert Gates, in particular, continues to fight these battles today as “Don’t Ask, Don’t Tell” comes under increasing criticism.²² The fact of this ongoing debate demonstrates that the intelligence community remains very conservative, and the same prejudices—those that have not been repealed by executive order—that motivated persecution of homosexuals over a decade ago remain prevalent.²³ As such, a more forceful repudiation of the old regulation is advisable.

These facts suggest that, as the *Lawrence* court suggests, the continued existence of restrictions against homosexuals serving in our intelligence

18. *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting).

19. *Id.* at 587.

20. *Id.* at 576, 587.

21. See *Doe v. Gates*, 981 F.2d 1316, 1318 (D.C. Cir. 1993) (considering former CIA Director, now Secretary of Defense, Robert Gates’s dismissal of a gay CIA employee); *Pruitt v. Cheney*, 963 F.2d 1160, 1161–62 (9th Cir. 1991) (involving former U.S. Vice President, then Secretary of Defense, Dick Cheney’s support of the discharge of a homosexual Army officer).

22. See Elisabeth Bumiller, *Repeal of ‘Don’t Ask, Don’t Tell’ Policy Filed in Senate*, N.Y. TIMES, Mar. 4, 2010, at A, available at 2010 WLNR 4481168 (discussing the ongoing congressional debate regarding the policy’s continued implementation).

23. See J. Michael Waller et al., *They’re Practicing “CYA” at the CIA*, UPI INSIGHT MAG., Sept. 23, 2002, at 6, available at 2002 WLNR 11988446 (explaining that many agents see the presence of homosexuals in their organization as the unnecessary result of political correctness).

services demeans these brave Americans who risk their lives for a country and an institution that still sees them as inferior.

A. *Bowers v. Hardwick*

Judge Posner recognized the superficiality of the *Bowers* Court's discussion of the conduct in question.²⁴ In the sphere of the intelligence community, the controlling federal regulation prohibiting the issuance of security clearances to homosexuals was issued shortly after the *Bowers* decision in 1987 and remains in effect to the present day.²⁵ Post-*Bowers*, it was common for courts to deny relief to the excluded homosexual, even to commonly grant summary judgment motions by the agency in question, thereby denying the litigant even minimal review of what may widely be seen as an important issue of human rights in a more progressive, modern context.²⁶

Worse yet, the *Bowers* decision prevented many courts from ruling on the equal protection merits of security classification discrimination cases, as those courts often felt preempted by the decision.²⁷ This allowed judicial precedent to be established upon the back of a ruling no longer valid today.

With the opinion in *Lawrence*, the United States Supreme Court struck down a wide area of jurisprudence in one fell swoop. The fact that almost every decision against homosexuals in the areas of intelligence agency employment and security clearance issuance explicitly relied upon *Bowers* in denying these citizens' due process, equal protection, and privacy rights meant that the implications of *Lawrence* were widespread in this area of the law.²⁸ Obviously, the *Lawrence* decision must necessarily call

24. RICHARD A. POSNER, *SEX AND REASON* 1 (1992) ("[J]udges know next to nothing about the subject beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations by the FBI and other bodies."). But see Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1759–60 (1996) (arguing that Posner may not, however, have reached a different conclusion than the *Bowers* Court).

25. 32 C.F.R. § 154.7 (2009).

26. See Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391, 441–43 (2002) (listing cases in which courts held for federal agencies and against homosexual employees and employment applicants).

27. See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1772 (1996) (emphasizing the perfunctory quality to courts' inquiry into the historical discrimination against homosexuals).

28. See, e.g., *Doe v. Gates*, 981 F.2d 1316, 1324 (D.C. Cir. 1993) (denying the Fifth Amendment equal protection claim of a terminated, homosexual CIA employee); High

into question these cases built on the *Bowers* precedent, a fact to which the *Kerrigan v. Commissioner of Public Health* court specifically referred: "[T]he United States Supreme Court overruled *Bowers*, thus removing the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a quasi-suspect class."²⁹ Again, even Justice Scalia rightfully, if reluctantly, recognized that the decision in *Lawrence* put many cases directly relevant to the intelligence community in severe doubt.³⁰

Justice Blackmun's prescient quoting of Justice Holmes in the former's dissent in *Bowers* gave the clear reasoning of the *Lawrence* Court over a decade before the latter decision.³¹ Justice Holmes may as well have been speaking to the intelligence community as well when he stated that a rule is "still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."³²

B. *Effects of the Exclusion of Homosexuals from Non-Governmental Jobs*

Another difficulty with these exclusions is that they inevitably extend into the sphere of private employment, causing harm to Americans who are far away from Quantico or Langley.³³ By 1973, the Industrial Secur-

Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (rejecting a class action challenge of the Department of Defense's policy of investigating homosexual employees), *reh'g denied* (July 23, 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (ratifying the Army's refusal to reenlist a homosexual servicemember); Woodward v. United States, 871 F.2d 1068, 1074-75 (Fed. Cir. 1989) (refusing to find for a servicemember released from active duty on grounds of his homosexuality); Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (finding that *Bowers* barred a homosexual's equal protection claim in an employment discrimination context). *But see* Swift v. United States, 649 F. Supp. 596, 601 (D.D.C. 1986) (noting that, in *Bowers*, the Court only addressed a homosexual's right to privacy, but not all other rights). The district court declared that the Supreme Court's ruling in *Bowers* did not bar a claim of discrimination based upon a person's sexual preference. *Id.*

29. 957 A.2d 407, 465 (Conn. 2008).

30. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

31. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (arguing that the case be decided on right to privacy grounds), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

32. *Id.*

33. *See Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (explaining that legally sanctioned discrimination against homosexuals reaches beyond criminal law and touches other areas, including the employment sphere); *Scott v. Macy*, 349 F.2d 182, 184 (D.C. Cir. 1965) (stating that discrimination in a public job could lead to discrimination elsewhere). While the court found in favor of the applicant, it cautioned that the government "not only disqualified him from the vast field of all employment dominated by the [g]overnment but

ity Clearance Review Office (ISCRO) refused to grant any clearances to professed or closeted homosexuals later discovered through government investigation who worked for private contractors.³⁴ This inability to gain the security clearances required for employees of many government contractors meant that many homosexuals were not only unable to gain public but also private employment.³⁵ Further, the Supreme Court has recognized that the discrimination against homosexuals that *Bowers* supports invariably bleeds into other areas, such as employment, including employment in the intelligence services.³⁶

C. National Security Is Negatively Impacted

During the deliberations in the *Buttino v. FBI* case, a truly embarrassing event for the intelligence community occurred: following the ruling in *High Tech Gays*, the Department of Defense issued a study showing that homosexuals, in fact, performed as good or better than the average heterosexual in resisting foreign intelligence pressure and in executing their daily duties.³⁷ This necessarily gives rise to a question about whether the exclusion of such a dependable subset of the citizenry from the intelligence services negatively impacts the security interests of the United States.³⁸ Considerable concerns over the effect that this ban has on military readiness, intelligence capabilities, and the safety and efficiency of the United States government writ large have come to the fore in recent years.³⁹ That the *Watkins v. U.S. Army* court expressly stated that homosexuals had served with distinction for decades before their proclivities

also jeopardized his ability to find employment elsewhere." *Scott*, 349 F.2d at 184 (citation omitted).

34. Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 404 (1973). Generally, both "open" and "closeted" homosexuals were denied security clearances. *Id.*

35. *Id.*

36. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

37. MICHAEL A. MCDANIEL, PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY 21 (1989), http://www.dod.gov/pubs/foi/reading_room/228.pdf.

38. See Liz Sidoti, 9,488 *Leave Military Due to Policy on Gays*, DESERET MORNING NEWS (Salt Lake City, Utah), Feb. 25, 2005, available at 2005 WLNR 2891506 (citing a disproportionate departure of intelligence officers discharged under the policy); *Recruiting Troubles Force Reconsideration*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Dec. 26, 2008, at B6, available at 2008 WLNR 24751800 (questioning the appropriateness of "Don't Ask, Don't Tell" in the face of a shortage of quality recruits and personnel in the armed forces).

39. Liz Sidoti, 9,488 *Leave Military Due to Policy on Gays*, DESERET MORNING NEWS (Salt Lake City, Utah), Feb. 25, 2005, available at 2005 WLNR 2891506; *Recruiting Troubles Force Reconsideration*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Dec. 26, 2008, at B6, available at 2008 WLNR 24751800.

were discovered⁴⁰ strongly suggested that this ban was ill-considered at least and quite harmful at worst.

The potentially negative impact that these exclusions have upon the national security of the United States is best shown by the persons within these agencies who actively worked against them, either from a conviction that the policies are morally wrong or in order to further those governmental interests that have been hurt by the dismissal of experienced career employees.⁴¹ These actions often continued the long tradition of turning a blind eye to homosexuality when it was convenient for an agency to do so.⁴² But in so doing, the agencies run the risk that if discovered, their actions may effectively commit them to support the continued employment of experienced homosexual employees.⁴³

It is impossible for the various sensitive intelligence agencies in the United States to have successfully excluded every homosexual from service, and thousands of homosexuals have served their country proudly while strangers in their own land. In fact, if the agencies did wish to exclude every possible person who could fall under their suspicion, they would potentially deny themselves the services of the approximately thirty-seven percent of males who have had at least one homosexual experience in their lifetimes⁴⁴—an action that the *Norton v. Macy* court, back in 1968, already knew was “absurd.”⁴⁵ Still, other courts were willing to accept the government’s contentions at face value, especially in the area of military intelligence.⁴⁶

Most relevant to the concerns of many is Justice Blackmun’s plea at the end of his dissent in *Bowers* that the Court not violate values that are

40. 875 F.2d 699, 709 (9th Cir. 1989).

41. See *id.* at 701–02 (describing the honest and successful service of an openly gay Army officer who was denied reenlistment based upon his admitted sexual orientation).

42. See, e.g., *id.* (citing one Army officer’s admission to the Corps even after admitting in writing to having homosexual proclivities).

43. See *id.* at 708 (stating that the government can be estopped if its acts “threaten to work a serious injustice and the public’s interest will not be unduly damaged by the imposition of estoppel” (citation omitted)).

44. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623 (1948). The distinction between persons who have engaged in homosexual activity and persons who are “homosexual” was noted. *Id.*; see also Nathaniel McConaghy, *Heterosexuality/Homosexuality: Dichotomy or Continuum*, 16 *ARCHIVES SEXUAL BEHAV.* 371, 411 (1987) (supporting Kinsey’s admittedly surprising numbers’ applicability in a modern context).

45. *Norton v. Macy*, 417 F.2d 1161, 1167 n.28 (D.C. Cir. 1969) (citing ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623 (1948)).

46. See, e.g., *Able v. United States*, 155 F.3d 628, 635 (2d Cir. 1998) (asserting that legislation pertaining to any aspect of the military “is entitled to ‘a strong presumption of validity,’ and must be sustained if ‘there is any reasonably conceivable state of facts that could provide a rational basis for the classification’” (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993))).

deeply rooted in our nation's history—including diversity and tolerance of nonconformity, which values the military, the CIA, and the FBI were all established to protect—by excluding homosexuals from the wider culture of our nation.⁴⁷

D. *The International Perspective*

As the majority and the dissenters noted in *Lawrence*, even the *Bowers* Court rightfully recognized the importance of "values we share with a wider civilization"⁴⁸ and, so, we must briefly review the status of the homosexual in similarly situated intelligence services of our forebears and allies. When we consider the homosexual's place under our equal protection standards, we must constantly remind ourselves that the freedom homosexuals seek to work, live, and love is now seen as an essential component of personal liberty in Judeo-Christian culture, as Chief Justice Burger noted years ago in his concurrence in *Bowers*.⁴⁹

It must be noted that a multitude of militaries in the world today allow homosexuals to serve openly. Even a cursory search of the relevant information shows that most of the United States' closest traditional allies—Australia, most European Union countries, Canada, and Israel, to name only several—allow such service.⁵⁰ More telling is a partial list of those countries that agree with the United States' current stance on homosexual service, which includes dubious powers such as Iran, Saudi Arabia, and most Middle Eastern nations, which outlaw homosexuality generally.⁵¹ It is clear that the great weight of the concern for the morality and history we share with other nations to which Justice Burger alluded now comes down firmly on the side of allowing homosexuals to serve their country openly.

The most relevant precedent from the courts of our sister democracies is represented in a recent ruling of the European Court of Human Rights. In this case, *Smith v. United Kingdom*, the court reviewed the petitions of two officers of the United Kingdom's Royal Air Force.⁵² The case of one

47. *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Blackmun, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

48. *Lawrence*, 539 U.S. at 576.

49. *Bowers*, 478 U.S. at 196.

50. HUM. RTS. CAMPAIGN, REPEAL DADT NOW: NOT TOMORROW. NOT NEXT YEAR. NOW 2 (2010), http://www.hrc.org/sites/repealdadt/pdfs/RepealDADT_TalkingPoints_3_10.pdf; U.S. GEN. ACCOUNTING OFFICE, REPORT TO U.S. SEN. JOHN W. WARNER, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES IN FOREIGN COUNTRIES 5 tbl.1 (1993), <http://dont.stanford.edu/regulations/GAO.pdf>.

51. Don't Ask, Don't Tell Fact Sheet, <http://www.logcabin.org/logcabindc/DontAskDontTellFactSheet.html> (last visited Apr. 3, 2010).

52. 29 Eur. Ct. H.R. 493, 494 (1999).

of those officers, Mr. Graeme Grady, has particular relevance to the subject at hand. Grady was a sergeant in the Royal Air Force, with a prestigious and highly sensitive job at the British Defence Intelligence Liaison Service (North America) in Washington, D.C.⁵³ Grady served with distinction and, as a necessary function of his position, was regularly in contact with intelligence officials from other countries, including (ironically enough) the United States.⁵⁴ After being discovered as a homosexual, Grady was dismissed from the service for reasons that sound very similar to those underlying restrictions of homosexual service in both the United States military and civilian services.⁵⁵ The court found these reasons entirely unconvincing and wholly unsupported by the evidence.⁵⁶ Finally, the court found that the restriction violated Article 8 (privacy, a right not specifically enumerated in our Constitution), Article 13 (effective remedy, roughly comparable to due process rights under the Fifth Amendment), and Article 14 (equal protection, also found in our Fifth and Fourteenth Amendments) of the European Convention on Human Rights, and ordered the United Kingdom to come to an agreement with Grady over how to redress these violations.⁵⁷

This result necessarily begs the question: how can a ban on homosexuals defending their country through the intelligence services be entirely proper in the United States but wholly objectionable in Europe, in which a majority of our laws and culture originated and which is home to the very same precedent and culture the Supreme Court used to justify its decision in *Bowers*?⁵⁸

III. DEFERENCE AND INTELLIGENCE-RELATED EMPLOYMENT DECISIONS

Throughout the relatively short history of the intelligence services, courts have repeatedly held that the CIA and other intelligence agencies are not bound by traditional legislative enactments that ordinarily limit

53. *Id.* at 503.

54. *Id.*

55. Compare *id.* at 512–13 (citation omitted) (“[H]omosexual behavi[or] can cause offen[s]e, polari[z]e relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness.”), with 10 U.S.C. § 654(a)(15) (2006) (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”).

56. *Smith*, 29 Eur. Ct. H.R. at 495 (“The [c]ourt notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail.”).

57. *Id.* at 544.

58. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

the powers of federal agencies in employment decisions.⁵⁹ The issuance of security clearances by executive agencies outside of the Department of Defense is governed by executive order.⁶⁰ Although President Clinton restricted the effect that anti-homosexual regulations had on clearance applicants, President Eisenhower's executive order establishing the requirements for the same⁶¹ is still controlling. Those federal agencies that Congress has not exempted from Office of Personnel Management control and the Administrative Procedure Act have homosexuals openly in their employ and are not allowed to exclude such persons even from sensitive employment without absolute individualized proof that it would harm the interests of the United States.⁶² As a result, homosexuals are allowed to serve openly and honorably in several agencies that are just as sensitive as those agencies that are exempted from the standard rule.

In reviewing the employment- and classification-related determinations of the intelligence community, courts enter an area of traditional judicial deference to the government.⁶³ Courts recognize the obvious truth that in matters of intelligence, a strong tradition of deference is required in order to safeguard our nation's secrets.⁶⁴ But this does not mean that courts are entirely without power in intelligence-related cases. Indeed, there is a long line of cases that make it clear that those agencies' administrators' exercise of judgment is entirely reviewable by courts.⁶⁵ In *Doe*

59. See *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information."

Id. (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (noting that the FBI is exempt from congressional statutory schemes typically governing civil service); Christopher Scott Maravilla, *Judicial Review of Security Clearances for Homosexuals Post-U.S. Department of the Navy v. Egan*, 13 ST. THOMAS L. REV. 785, 795 (2001) (noting that while an agency may not impede an individual's constitutional rights, it may make employment decisions at its own discretion).

60. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), reprinted at 50 U.S.C. § 435 (2006).

61. Exec. Order No. 10,450, 18 Fed. Reg. 2,489 (Apr. 27, 1953).

62. *Ashton v. Civiletti*, 613 F.2d 923, 928-30 (D.C. Cir. 1979) (requiring that an FBI employee "could properly be dismissed *only* for failing to perform his duties satisfactorily and without prejudice to the FBI's achievement of its law-enforcement mission" (emphasis added)).

63. See, e.g., *Doe v. Casey*, 796 F.2d 1508, 1520-21 (D.C. Cir. 1986) (holding that great deference is owed to the Director of the CIA regarding personnel decisions), *aff'd in part and rev'd in part on other grounds*, 486 U.S. 592 (1988).

64. *Egan*, 484 U.S. at 529-30.

65. E.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating "that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear");

v. Casey, the court was even kind enough to provide examples of several situations in which an employment or classification decision of the Director of the CIA is reviewable: race, gender, and, somewhat humorously, hair color.⁶⁶

Additionally, an intelligence employee may be terminated only if his or her continued employment would be contrary to the interests of the United States.⁶⁷ As a logical result, it is altogether permissible to assume that Congress did not mean to prohibit consideration of constitutional claims arising from the employment actions of the intelligence community. Therefore, it is well established that an administrator's decision to terminate an employee cannot be a "wholly irrational, vindictive or even blatantly unconstitutional action."⁶⁸

But this review must not expand into an impermissible inquiry into the mere wisdom of a termination; it must simply seek to curtail decisions that are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"⁶⁹ In finding that terminations or denials of security clearances were proper, courts have usually required something more than passing references to the problems homosexuals could conceivably cause in the intelligence community.⁷⁰ Especially in occupations covered by the Administrative Procedure Act, a mere assertion of concern over homosexual employment does not justify government obstinacy.⁷¹ As a result of the D.C. Circuit's thorough review of the key reasons for deference in intelligence cases,⁷² *Casey* became a crucial stepping stone in the development of courts' discretion in these matters.

The high water mark of this period of judicial deference to intelligence agencies appeared in 1990, when the Ninth Circuit found that governmental agencies were entirely justified in using controversial investigatory policies and procedures (such as asking an applicant the last time he masturbated with someone else, when it last occurred, and with whom) in

Doe, 796 F.2d at 1516–17 (reasoning that had Congress intended for the Director of the CIA's personnel decisions to be unreviewable, it could have more carefully legislated to that effect).

66. *Doe*, 796 F.2d at 1517–18.

67. *Id.* at 1522 ("At the very least, the CIA would have to justify why such a ban on the employment of all homosexuals was 'necessary or advisable in the interests of the United States.'").

68. *Id.* at 1518.

69. *Id.* at 1520 (quoting 5 U.S.C. § 706(2)(A) (2006)).

70. See, e.g., *Wentworth v. Laird*, 348 F. Supp. 1153, 1155 (D.D.C. 1972) (finding that homosexual employee's mere susceptibility to potential blackmail is insufficient justification for termination of security clearance).

71. See *Swift v. United States*, 649 F. Supp. 596, 603 (D.D.C. 1986) (refusing the State's motion to dismiss on grounds that the APA does not apply to the White House).

72. *Doe*, 796 F.2d at 1521–22.

order to determine if an applicant for or holder of a security clearance was homosexual.⁷³ This was a period where a simple handwritten letter claiming that a person was homosexual was more than sufficient to cause the government to investigate and revoke the employee's security clearance.⁷⁴

By this time, however, those courts that had attempted to impose some limits upon the procedures that the government could use in its investigatory efforts found that such judicial efforts would often have little or no effect.⁷⁵ But this period of deference ended quite suddenly later in the 1990s, when several landmark cases exposed deeply institutionalized, irrational hatred toward homosexuals. In one rather infamous case, a former FBI agent was able to establish that the FBI treated homosexual employees far differently and monitored them far more closely than their heterosexual counterparts.⁷⁶ Agent Frank Buttino established that the FBI would often initiate proceedings against even the most decorated of agency veterans on the mere assertion of homosexuality by a third party.⁷⁷ Additionally, the federal district court found that the average heterosexual FBI agent charged with "lack of candor" received censure and a suspension without pay for seven to sixty days, as opposed to homosexuals, who would be terminated for their "lack of candor" in trying to keep their orientations hidden.⁷⁸ Most damaging to the FBI in *Buttino v. FBI* was the fact that several former agents gave evidence (undisputed by the FBI) showing that anti-gay discrimination was rampant in the department.⁷⁹ This testimony, when combined with internal information proving the FBI's "significant interest" in anything hinting of homosexuality within its ranks, was more than sufficient to establish the FBI's irrational bias.⁸⁰ The FBI Director's repeated and unintentionally humorous statements to several courts denying that he had any "out" homo-

73. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 563 (9th Cir. 1990), *reh'g denied* (July 23, 1990).

74. *See Buttino v. FBI*, 801 F. Supp. 298, 300 (N.D. Cal. 1992) (describing a situation in which the FBI received an undated, handwritten letter that launched a massive investigation into the personal life of an FBI agent, whose security clearance was ultimately revoked upon the FBI's verification of the agent's homosexuality).

75. *See Robin Cheryl Miller, Annotation, Federal and State Constitutional Provisions as Prohibiting Discrimination on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391, 478-79 (2002) (discussing the impact of the limitations set by courts in this area).

76. *Buttino*, 801 F. Supp. at 300.

77. *Id.*

78. *Id.* at 304.

79. *Id.* at 305.

80. *Id.*

sexuals in his employ certainly did not help the agency's case either.⁸¹ Even more egregiously, the FBI, after finding a homosexual among its ranks, would often force that person to disclose private sexual histories into childhood and often used pressure in order to force a person into "outing" other homosexuals in the FBI, creating what one could generously term "witch hunts."⁸²

Looking at the *Buttino* decision, it becomes clear that many of the restrictions placed upon homosexuals are entirely artificial, and in the past, courts have not required sufficient justification for those restrictions in the cases that have appeared before them. The need for judicial intervention in egregious cases like *Buttino* is what drove the decline of deference to the individual intelligence agencies seen in the 1990s and led to the more critical standard that exists today.

IV. COMMON JUSTIFICATIONS FOR THE EXCLUSION OF HOMOSEXUALS FROM SENSITIVE POSITIONS

Often, the mere assertion of homosexuality would be enough to dismiss a government employee or to deny her a security clearance.⁸³ In an attempt to solidify its reasons for such an action, the government would cite homosexuals' alleged poor judgment, untrustworthiness, or susceptibility to blackmail.⁸⁴ The *High Tech Gays* ruling further supported the presumption that homosexuals are a much greater security risk than other Americans.⁸⁵ Eventually, the standard reasons that agencies gave for excluding homosexuals from service coalesced around a few main justifications—some much more developed and reasonable than others.

A. *Susceptibility to Blackmail*

The intelligence community's blackmail justification is among the most cited reasons for terminating homosexual employees. This justification arose from intelligence agencies' understandable concern that centered on the possibility that foreign intelligence services may try to use the moral approbation or illegality of homosexuality to blackmail agents.⁸⁶

81. *Buttino*, 801 F. Supp. at 305.

82. *Id.*

83. *See, e.g., id.* at 300 (describing the case of an FBI agent who lost his security clearance and job as soon as the FBI caught wind that he was a homosexual).

84. Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 409 (1973).

85. *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 575 (9th Cir. 1990) (holding that the Department of Defense had a rational interest in conducting extensive investigations of homosexual applicants for employment), *reh'g denied* (July 23, 1990).

86. *Id.* at 568.

Newfound criticism comes mostly as a by-product of the weakening of what was the most powerful justification for the blackmail concern—the forced outing of homosexuals by the Soviet Committee for State Security (KGB).⁸⁷ Some facts have come to the fore in questioning the continued validity of this blackmail concern: first, in 1992, the KGB ceased to exist and there is no evidence that its successor organization (the Russian FSB) has continued such a targeted mission; and second, the fact that the FBI has not provided evidence after *High Tech Gays* that the Soviet Union was ever successful at its attempt to recruit homosexual American spies.

A more contemporary approach can be seen in those cases where denials of security clearances affected the fully “out” homosexual. This openness often would create problems for the United States at trial when the employee’s laudable honesty would fatally undercut the blackmail excuse.⁸⁸ The blackmail rationale, ironically, was most often undercut when an agent charged as a homosexual made a very public and well-known federal case over his dismissal based on supposed privacy concerns.⁸⁹

B. *Illegality*

Concerns over illegality arose from the fact that sodomy was, until recently,⁹⁰ illegal in a significant minority of states, a fact that played a major role in causing the average homosexual to naturally fear being discovered breaking the law. Former FBI Director William Webster referred to this eventuality when he stated that there was a “potential for

87. *Id.* at 577.

88. *See, e.g.,* Ashton v. Civiletti, 613 F.2d 923, 925 (D.C. Cir. 1979) (relating former FBI employee’s affidavit, in which he explained that when questioned by the FBI regarding his sexuality, he openly admitted that he was gay and was then terminated). The D.C. Circuit ultimately found that because the FBI assured its non-probationary, non-investigative employee that he would only be terminated for job-related reasons and not based on his admitted sexuality, the employee’s due process rights were violated when he was, in fact, terminated for being a homosexual. *Id.* at 931.

89. *See, e.g.,* McKeand v. Laird, 490 F.2d 1262, 1265–66 (9th Cir. 1973) (Peckham, J., dissenting) (attacking the majority’s finding that termination of employee of Department of Defense contractor based on employee’s undisclosed homosexuality was legitimately based on national security concerns).

Of course, any homosexual with a security clearance will fear disclosure—if not to his family and friends, at least to the government—as long as the Department of Defense continues to revoke security clearances on a mere finding of homosexuality. However, the Department of Defense easily can cure the danger to national security allegedly posed by all homosexuals. It can abandon its arbitrary system of revoking security clearances solely on a finding of homosexuality and, thus, end homosexuals’ fears that public exposure will cost them their security classifications.

Id.

90. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (overruling former decisions upholding state sodomy bans).

compromise” for those who participated in what was then illegal conduct.⁹¹

Thankfully, this justification was sent to a well-deserved grave as a result of the *Lawrence* decision. The *Lawrence* Court, in striking down an anti-sodomy statute, noted that “[sodomy] laws were arbitrarily enforced and thus invited the danger of blackmail.”⁹² Nationwide invalidation of such laws necessarily undercut that inherent danger.

C. *Morality*

Although usually hidden, this area of concern is one that remains with us today. Recently, when questioned by the *Chicago Tribune*, General Peter Pace, former Chairman of the Joint Chiefs of Staff, stated that he “believe[d] homosexual acts between two individuals are immoral.”⁹³ This continuing fight over morality is unfortunate in this context, as scholars have criticized the fact that homosexuals are discriminated against for no better reason than the enforcement of certain intelligence officers’ moral codes or a general feeling that homosexuals are intrinsically disordered.⁹⁴ But a morality-based argument may not withstand a rational basis analysis.⁹⁵

Furthermore, courts have repeatedly recognized that they are required to guard against the possibility that an agency’s claim of “immorality” to justify denying homosexuals employment is simply an attempt to eliminate all homosexuals from the service through the imposition of “Olympian” standards of rectitude.⁹⁶ In a particularly strong statement that indicts, in part, the intelligence community’s restrictions against homosexuals, the California Supreme Court declared that all restrictions against homosexuals require that “courts must look closely at classifica-

91. *Ashton*, 613 F.2d at 927 n.5 (citation omitted).

92. *Lawrence*, 539 U.S. at 572.

93. William Neikirk & Karoun Demirjian, *Pace Takes Fire on Gays Remark*, CHI. TRIB., Mar. 14, 2007, at 3, available at 2007 WLNR 4788556. But on February 2, 2010, current Chairman, Admiral Mike Mullen, stated in a Senate Armed Services Committee hearing: “Speaking for myself and myself only, it is my personal belief that allowing gays and lesbians to serve openly would be the right thing to do.” John J. Kruzel, *Gates Appoints Panel for Potential End of ‘Don’t Ask, Don’t Tell,’* Feb. 2, 2010, <http://www.jcs.mil/newsarticle.aspx?ID=219>.

94. E.g., Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 409 (1973).

95. See *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring) (noting that mere moral disapproval of a certain group will not suffice to uphold a discriminatory statute).

96. See *Norton v. Macy*, 417 F.2d 1161, 1163–64 (D.C. Cir. 1969) (“The courts have, it is true, consistently recognized that the [government] enjoys a wide discretion in determining what reasons may justify removal of a federal employee; but it is also clear that this discretion is not unlimited.” (footnote omitted)).

tions based on [sexual orientation] lest *outdated* social stereotypes result in invidious laws or practices."⁹⁷

D. Candor

The *Buttino* court recognized a central weakness in the candor concern when it examined the FBI's investigations. The court noted that the "problem" with the FBI's homosexual employees was largely of the intelligence community's own making, remarking that the requirement that homosexual employees be both "open" (in that these employees were expected to fully divulge their sexuality as it was deemed relevant to the integrity of the agency's personnel investigations) and "discreet" (in that employees were expected not to be homosexual or to divulge that they were, lest unsavory foreign intelligence organizations use that information in order to blackmail them) was *prima facie* ridiculous and obviously could not be met by any employee so situated.⁹⁸ It was clear to the court that, but for the FBI's history of anti-homosexual discrimination, Buttino would not have been forced to deny his orientation and, thus, violate the FBI's candor regulations.

The FBI is not the only agency to rely upon violation of candor requirements as a reason to terminate homosexual intelligence employees. The CIA made it clear that an agent's failure to disclose his sexuality was a severe violation of its own candor expectations, regardless of the fact that the CIA's very own anti-homosexual regulations worked to create this problem of non-disclosure in the first place.⁹⁹ As a result, this constant fear of a CIA investigation of one's private life was perversely the main motivation behind many agents' lack of candor.¹⁰⁰

97. *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (citation omitted) (emphasis in original), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

98. See *Buttino v. FBI*, 801 F. Supp. 298, 313 (N.D. Cal. 1992).

[T]his [c]ourt is simply acknowledging that the [E]qual [P]rotection Clause of the United States Constitution is at least implicated where a government agency allegedly turns a certain class of its own employees into security risks by its own policies, and then cites that 'security risk' as the basis for the termination of a member of the affected class.

Id.

99. See *Doe v. Gates*, 981 F.2d 1316, 1324 (D.C. Cir. 1993) (recognizing that the reason for Doe's lack of candor was his fear of the CIA discovering his homosexuality and terminating his employment, which it did).

100. See, e.g., *id.* (describing Doe's motivation for failing to disclose his homosexuality, despite the fact that his lack of candor was ultimately what led to his termination).

E. *Mental Stability*

Another justification plays on long-held stereotypes of homosexuals. Intelligence agencies and courts have voiced their concerns over the mental and emotional stability of homosexual employees, charging that homosexuals as a group suffer from some mental defect that renders them unsuitable for service in the intelligence community.¹⁰¹ These concerns were largely disproven by 1973 and have continued to be criticized and dismissed since.¹⁰² Any mental problems that did crop up among homosexual intelligence employees tended to be a direct result of the forced closeting that naturally resulted from the restrictions placed upon homosexual employees by their respective agencies.¹⁰³

101. See *Norton*, 417 F.2d at 1166. In upholding a NASA dismissal of a homosexual employee, the court stated, "The homosexual conduct of an employee might bear on the efficiency of the service in a number of ways . . . it may in some circumstances be evidence of an unstable personality unsuited for certain kinds of work." *Id.*; DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 270-77 (1975), *excerpt available at* <http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html>.

The conclusion of the subcommittee that a homosexual or other sex pervert is a security risk is not based upon mere conjecture. That conclusion is predicated upon a careful review of the opinions of those best qualified to consider matters of security in Government, namely, the intelligence agencies of the Government. Testimony on this phase of the inquiry was taken from representatives of the Federal Bureau of Investigation, the Central Intelligence Agency, and the intelligence services of the Army, Navy and Air Force. All of these agencies are in complete agreement that sex perverts in Government constitute security risks. The lack of emotional stability which is found in most sex perverts and the weakness of their moral fiber, makes them susceptible to the blandishments of the foreign espionage agent.

DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 270-77 (1975), *excerpt available at* <http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html>; Gregory B. Lewis, *Barriers to Security Clearances for Gay Men and Lesbians: Fear of Blackmail or Fear of Homosexuals?*, 11 J. OF PUB. ADMIN. RES. AND THEORY 539 (2001), *available at* 2001 WLNR 12616641 ("Cold War fears that homosexuals were disloyal or susceptible to blackmail sparked prohibitions on federal employment and security clearances for gay men and lesbians, but the homosexual's presumed moral weakness and emotional instability played at least as important a role.").

102. *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) ("Although society—and courts—may still grapple with this question, in 1973 the American Psychiatric Association removed homosexuality from its list of psychic disorders."), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

103. See Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 241 (1993) (discussing the effects of societal pressures on homosexuals).

V. DUE PROCESS

In previous eras of this area of litigation, it was entirely common for courts to overlook due process concerns in favor of simply disposing of claims concerning fundamental constitutional rights as no more than administrative matters best left to the discretion of the individual agencies.¹⁰⁴ The disregard for basic constitutional questions raised by this policy led to clear abuses of the system. A particularly egregious example occurred when the FBI sent dozens of letters to law schools clearly stating that it did not automatically dismiss or suspend homosexuals.¹⁰⁵ Those schools would subsequently expose this assertion as a complete fabrication.¹⁰⁶ Instead of sanctioning the FBI for lying about its homosexual exclusion policy when it was challenged by an employee, the D.C. Circuit overlooked the FBI's indiscretion, saying that although those letters cited specific FBI policy, they were still not sufficient to show the FBI's clear intent to discriminate and did not establish FBI policy.¹⁰⁷

To ignore the fact that some agencies during this period often utilized flimsy justifications in order to exclude homosexuals would effectively deny affected persons their due process rights. As mentioned previously, then-Director of the FBI, William Webster, gave an excellent example of such a flimsy justification in 1979.¹⁰⁸ The *Ashton v. Civiletti* case reveals the ridiculousness of extending this policy to file clerks pushing mail carts through the J. Edgar Hoover building, to whom Webster stated the policy would also apply.¹⁰⁹ Webster went on to state that heterosexual employees who commit adultery should be and are treated differently than homosexual employees, justifying the difference by stating that the FBI intended to "stay out of people's private lives."¹¹⁰ Apparently, the irony

104. Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391, 475 (2002).

105. *Padula v. Webster*, 822 F.2d 97, 99 (D.C. Cir. 1987).

106. *See id.* at 101 (revealing that the FBI is, in fact, highly unlikely to hire homosexuals).

107. *Id.*

108. *Ashton v. Civiletti*, 613 F.2d 923, 927 n.5 (D.C. Cir. 1979) (citation omitted). When asked whether the Bureau had dismissed a file clerk for being a homosexual, Webster replied, in part:

Traditions in law enforcement and I've checked around all the different federal agencies and I know the posture in state and local law enforcement has been that there is a potential for compromise for those who engage in such conduct which is generally not approved by society, and in some places, illegal. Now, we treat it as a factor, and I must say in candor, it's a significant factor.

Id.

109. *Id.* at 927 (citation omitted).

110. *Id.* at n.5 (citation omitted).

of that statement was entirely lost on the Director. Nevertheless, the due process and equal protection concerns brought about by this line of questioning are obvious.

Several government organizations have been forced to address the due process concerns implicated by the denial of security clearances to homosexuals.¹¹¹ These organizations repeatedly assert that homosexuals are not barred automatically as a result of their orientation, but rather it is simply a cosmic coincidence that all homosexual applicants for such clearances have been denied.¹¹² A denial of security clearance in such a situation constitutes an impermissibly arbitrary government action and, therefore, equates to a denial of due process. While there is certainly no right to government employment or to a security clearance, persons must be terminated or denied employment by means that comport with the Due Process Clause.¹¹³ Further, multiple incidents of homosexuals receiving from less representative agency boards far more severe punishments for their alleged transgressions raises questions over whether due process is less than what is truly due homosexuals, as agency procedure for dismissing homosexual employees need only meet the barest level of procedural rigor in order to be deemed sufficient under due process inquiry.

There are some cases in which courts were willing to intervene, such as when agencies would discover their agents' hidden homosexuality only after a long career of service. In one such case, the D.C. Circuit decided that there was no fair reason justifying the denial of due process to a homosexual employee when that employee had been gainfully employed by the agency for more than a decade with a stellar record, often with excellent peer and supervisor reviews.¹¹⁴

Unfortunately, for a litany of reasons, litigants have generally failed to assert the due process claims evident in such arbitrary decisions.¹¹⁵ In the

111. Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 420 (1973).

112. See *id.* (examining officials' claims that homosexuals are not categorically denied security clearances).

113. *Norton v. Macy*, 417 F.2d 1161, 1163-64 (D.C. Cir. 1969) (pointing out that federal legislation prevents protected civil servants from dismissal unless dismissal would "promote the efficiency of the service"). Reasons for dismissal can include "notoriously disgraceful conduct," immoral conduct, and anything that "makes an individual unfit for the service." *Id.*; Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 421 (1973) ("While there may be no right to public employment, or to a security clearance, courts now recognize the right to be accorded due process of law in being adjudged ineligible for such employment.").

114. *Wentworth v. Laird*, 348 F. Supp. 1153, 1156 (D.D.C. 1972).

115. Kathleen M. Graham, Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 424 (1973).

absence of such claims and free from the sanitizing light of judicial prodding, intelligence agencies have been free to assert essentially any reason for denying homosexual employees clearances.

Due process analysis is far more effective and clear in the context of jobs not covered by the exemptions granted to the CIA and FBI, as courts have required that those covered agencies (e.g., the Secret Service) produce evidence that homosexuality actually impairs the good functioning and order of the agency in question.¹¹⁶ One must then ask if, in fairness, it is equitable that different definitions of "due process" exist and are acceptable for differing agencies in substantially similar fields.

VI. PRIVACY

In what can only be considered a revolutionary statement for the time, some pre-*Bowers* lower courts held that there is a First Amendment right to keep one's sex life private and that right extends to homosexual relationships.¹¹⁷

The D.C. Circuit has established that the "[FBI] seems preoccupied with what might well be thought the private lives of its employees."¹¹⁸ The use of limited law enforcement resources (especially in the case of the FBI) in order to conduct investigations into the private sexual affairs of individuals would eventually be seen as "uncommonly silly."¹¹⁹ With the demise of *Bowers*, the privacy issues surrounding the exclusion of homosexuals must be addressed in future litigation in this area.

VII. EQUAL PROTECTION

It is evident that the most common, and perhaps most heartfelt, attack on this exclusionary policy arises from the Equal Protection Clause of the

116. See, e.g., *Soc'y for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399, 400 (N.D. Cal. 1973) (distinguishing between a dismissal from the Secret Service and from another agency based upon the employee's homosexuality), *aff'd in part*, 528 F.2d 905 (9th Cir. 1975).

117. *Marks v. Schlesinger*, 384 F. Supp. 1373, 1376 (C.D. Cal. 1974) (observing that there is a right to form private relationships that extends to homosexuals); *Wentworth*, 348 F. Supp. at 1156 ("In normal circumstances, there is a right under the First Amendment for an individual to keep private the details of his sex life, and this applies to homosexuals, professed or otherwise.").

118. *Ashton v. Civiletti*, 613 F.2d 923, 929 (D.C. Cir. 1979) (referring to the Bureau's employee handbook).

119. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)). "Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources." *Id.*

Fourteenth Amendment. In earlier jurisprudence, the Equal Protection Clause was seen as offering no succor to these excluded persons.¹²⁰ It is also important to note for the purpose of this analysis that, even with the large amount of homosexuality-related litigation currently ongoing, the United States Supreme Court has still never decided which level of judicial scrutiny applies to homosexuals.¹²¹

Most of the problems surrounding the placement of homosexuals within the spectrum of classes for equal protection purposes centers around the fact that no one court seems to know what type of scrutiny homosexuals qualify for. Some courts have called for a more advanced form of scrutiny in cases dealing with homosexuals.¹²² At least one court suggested an "active" standard of review.¹²³ In direct reference to the military and intelligence communities, another court adopted a "heightened solicitude" standard.¹²⁴ More generally, Justice O'Connor suggested a "more searching form of rational basis review."¹²⁵

The reasons for disregarding the usual deference for a more active review stems from the apparent arbitrariness of rational basis review's application to these cases. Any minor concern that the intelligence community might have about its homosexual employees quickly becomes an entirely rational reason for termination; thus, litigants are denied the benefit of the colorable constitutional claim necessary to maintain an equal protection action.

When the Supreme Court of Iowa suspected that a governmental action was taken in order to further a deep-seated prejudice against a certain group of people, it expressly found that it is the court's judicial duty to act in defense of that targeted minority.¹²⁶ Other courts have also become far more willing to accept some homosexual employees' contention that although government agencies state that their homosexual bans are solely meant to be enforced against prohibited conduct (which would not

120. Kathleen M. Graham, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 409 (1973).

121. *Varnum v. Brien*, 763 N.W.2d 862, 885–86 (Iowa 2009).

122. *E.g.*, *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008) (requiring that California courts apply strict scrutiny to all claims involving discrimination on the basis of sexual orientation), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

123. *Pruitt v. Cheney*, 963 F.2d 1160, 1165–66 (9th Cir. 1991).

124. *Watkins v. U.S. Army*, 875 F.2d 699, 721 (9th Cir. 1989) (Norris, J., concurring). "Heightened solicitude" is not strict scrutiny; it is more akin to intermediate scrutiny. *Id.*

125. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

126. *Varnum*, 763 N.W.2d at 880.

raise a constitutional issue), the bans are, in fact, aimed at outlawing an entire class of people.¹²⁷

As the jurisprudence on this issue has developed, more and more courts have become willing to recognize the equal protection implications of homosexual exclusion policies.¹²⁸ This is a fortuitous development for both homosexuals and the legal community, as courts have often denied justice to those very people who most needed the aid of their government's guarantee of equal protection.¹²⁹ In a number of more recent cases, courts have held that the denial of any rights pertaining to all Americans violates equal protection without as much as a rational reason for such discrimination.¹³⁰ Indeed, a great many restrictions against homosexuals make so little sense that even a rational basis test is often sufficient to dismiss a government's "rational" explanation for its exclusionary policies.

Truly revolutionary jurisprudence on the equal protection issue recently occurred in Iowa. In the distant but related realm of the gay marriage debate, the Iowa Supreme Court made a rather remarkable statement. After reviewing the history of discrimination against homosexuals, recent scientific investigations that strongly suggest that homosexuality is immutable,¹³¹ and the fact that the political power of homosexuals has thus far been ineffective at providing many sought-after rights, the court concluded that governmental discrimination against homosexuals "demand[s] closer scrutiny."¹³²

127. *E.g.*, *Watkins*, 875 F.2d at 714 (Norris, J., concurring) (arguing that a close reading of the Army's regulation banning homosexuals from service reveals that the ban is aimed at homosexual orientation, not simply at homosexual acts).

128. Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination on Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391, 441-43 (2002).

129. *See* Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 249 (1993) (suggesting that homosexuals have been denied rights that other citizens have not).

130. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (determining that a Colorado constitutional amendment prohibiting any legislation designed to protect homosexual persons from discrimination impermissibly discriminated against homosexuals' rights under the federal Equal Protection Clause).

131. *Cf.* M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 2 (2009) (questioning the continued utility of the irreconcilable "immutability debate").

132. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009).

A. *Political Inefficacy*

We must now investigate the current status of homosexuals vis-à-vis the traditional three-pronged equal protection test applied to suspect classifications, which is articulated in *Conaway v. Deane*.¹³³

The first prong of suspect class analysis requires proof of political inefficacy or powerlessness,¹³⁴ which is where many attempts to fit homosexuals under stricter forms of scrutiny have historically failed.¹³⁵ Problematically, the Supreme Court has never defined or clarified the exact meaning of "political power," thus leaving individual courts and states to grope around in the dark for a suitable definition.¹³⁶ Most of the time, these challenges fail because the courts fail to take into consideration the detrimental effects of the "closet." This closet, which is a common term used to describe non-admitted homosexuals, effectively divorces a large number of potentially powerful homosexuals from the

133. 932 A.2d 571, 606 (Md. 2007).

There is no brightline diagnostic, annunciated by either this [c]ourt or the U.S. Supreme Court, by which a suspect or quasi-suspect class may be recognized readily. There are, however, several indicia of suspect or quasi-suspect classes that have been used in Supreme Court cases to determine whether a legislative classification warrants a more exacting constitutional analysis than that provided by rational basis review. These factors include: (1) whether the group of people disadvantaged by a statute display a readily-recognizable, "obvious, immutable, or distinguishing characteristics . . ." that define the group as a "discrete and insular minorit[y]"; (2) whether the impacted group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"; and (3) whether the class of people singled out is "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities [to contribute meaningfully to society]."

Id. (second and third alterations in original) (footnotes omitted).

134. *Id.*; see also *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (explaining that this factor asks whether the group that is encumbered by official discrimination has the political power that is needed to obtain redress from government agencies or branches).

135. See *Varnum*, 763 N.W.2d at 894 (stating that because gays and lesbians have successfully petitioned for many legal protections, they do not constitute a politically powerless group); *Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) (holding that the political power of homosexuals is sufficient to not classify homosexuals as a suspect class).

While gay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to work and raise a child, recent legislative and judicial trends toward reversing various forms of discrimination based on sexual orientation underscore an increasing political coming of age.

Conaway, 932 A.2d at 613.

136. *Conaway*, 932 A.2d at 607.

political process.¹³⁷ There can be little debate that some homosexuals, due to their fear of adverse consequences and discrimination, choose not to identify with their peer group and, therefore, adversely affect the political power of the entire minority.¹³⁸

Additionally, the number of individuals comprising the homosexual minority suggests that their actual political power is not concomitant to their expected power.¹³⁹ This results in an unfortunate circular reasoning problem, wherein homosexuals can only gain their rightful political power through visibility in the general population, but they cannot become fully free to be visible in the general population without gaining greater political power.¹⁴⁰ This powerlessness extends even to heterosexual supporters of homosexual employees in the military and intelligence fields—no soldier or intelligence officer (even the most empathetic) would want to be “caught” supporting homosexual causes or with homosexual friends for fear of being labeled homosexual him- or herself.¹⁴¹

Finally, several courts have recently held that a group’s political powerlessness need not be current in order to qualify for enhanced scru-

137. *Watkins*, 875 F.2d at 727 (Norris, J., concurring) (acknowledging the social and political pressures that encourage concealment of one’s homosexuality and the effects those pressures have on the willingness of homosexuals to openly protest anti-gay legislation); see also Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1797 (1996) (discussing the immobilizing impact closeted homosexuals have on gay political goals). The actuality of being in the closet has less than desirable consequences. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1800 (1996). Closeted homosexuals tend to lead a “cloistered life” and ultimately drain those actively pursuing equal protection rights. *Id.* at 1801. An argument can be made that homosexuals prefer the safety provided by staying in the closet, yet, could enjoy a greater universal safety only if they would step out to help fight the fight. *Id.*

138. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1801 (1996).

139. In the United States, out of more than 500,000 individuals holding public office at the national, state, and local levels, approximately three hundred are openly gay. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 477 (Conn. 2008). No individual publicly identifying his- or herself as homosexual has ever been appointed to a federal appeals court or cabinet position. *Id.* Nor has such an individual ever served as a United States Senator. *Id.* “In [Connecticut], no openly gay person ever has been elected to statewide office, and only five of the 187 members of the state legislature are openly gay or lesbian.” *Id.* (emphasis in original) (citation omitted).

140. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1801 (1996).

141. *Ben-Shalom v. Sec’y of the Army*, 489 F. Supp. 964, 974 (E.D. Wis. 1980) (holding unconstitutional an Army regulation permitting discharge of soldiers evidencing homosexual tendencies, desires, or interests), *aff’d in part*, 776 F.2d 1049 (7th Cir. 1985).

tiny.¹⁴² This is because there are many groups recognized under the quasi-suspect and fully suspect classes that are now politically powerful¹⁴³ (one could not contend otherwise, with the influence that the NAACP and the National Organization for Women currently have within our political system, in addition to the more obvious fact that we have an African-American¹⁴⁴ president).

B. Mutability

The first prong also asks if the group's defining characteristic is immutable and, hence, "discrete" in the more classical meaning of that term.¹⁴⁵ This is an area of great debate in relation to homosexuality (and, indeed, for the intelligence community as well), and courts have come to many different conclusions about immutability. Traditionally, most courts held that homosexuality is not an immutable trait, such as race or gender, but is "primarily behavioral in nature."¹⁴⁶ These courts found homosexuality to be entirely behavioral in nature and, thus, not relevant to the investigation of immutability.¹⁴⁷

Today, some note that even if sexual orientation is not fully immutable, it nonetheless forms part of the core of a person's being and may be

142. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan*, 957 A.2d at 440–41; *Varnum v. Brien*, 763 N.W.2d 862, 894 (Iowa 2009).

143. *See Kerrigan*, 957 A.2d at 441 ("As the plaintiffs also emphasize, courts continue to apply heightened scrutiny to statutes that discriminate against women and racial minorities notwithstanding the great strides that both groups have made and continue to make in recent years in terms of their political strength.").

144. *Cf.* Gloria J. Liddell et al., *Is Obama Black? The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated from a Historical Socio-Political Perspective*, 12 SCHOLAR 213, 216–17 (2010) (discussing the disagreement over whether the forty-fourth president is "Black," "African-American," or something else). The authors ultimately conclude that, per their proposed definition, President Obama is, indeed, both "Black" and "African-American," *id.* at 258, but they recognize the uncomfortable fact that by defining a mixed-race individual exclusively by his "Black half," the nation is, perhaps, continuing to embrace the old "one-drop rule" espoused in *Plessy v. Ferguson*. *Id.* at 216–17.

145. *Conaway v. Deane*, 932 A.2d 571, 606 (Md. 2007); *see also Varnum*, 763 N.W.2d at 893 (Iowa 2009) ("Immutability may [serve to] separate truly victimized individuals from those who have invited discrimination by changing themselves so as to be identified with the group.").

146. *E.g.*, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (asserting that homosexuality is fundamentally different than the traits that define suspect and quasi-suspect classes).

147. *E.g.*, *id.* ("Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature. . . . The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." (citations omitted)).

highly resistant to change.¹⁴⁸ Indeed, the most recent cases on the issue have established a trend toward accepting the immutability of homosexuality and, in any event, finding immutability to be less than an absolute determination.¹⁴⁹ Moreover, if immutability is the standard, one judge humorously posited whether racial discrimination would become appropriate if medical science found an easy way to change one's skin color.¹⁵⁰ He concluded that the converse question on immutability must be asked: "[I]t seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation."¹⁵¹

Additionally a multitude of scientific discoveries building upon years of work and study in this field support the proposition that homosexuality is fully immutable.¹⁵² In any event, the steady erosion of immutability's relation to equal protection has rendered it increasingly irrelevant.¹⁵³

C. History of Discrimination

Courts generally do not dispute that homosexuals suffer from a long history of discrimination.¹⁵⁴ Even in today's more permissive environment, homosexuals continue to suffer from open and obvious discrimina-

148. *E.g.*, *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (stating that the Supreme Court treats a trait as immutable if altering that trait would entail massive physical change or enormous difficulty); *Able v. United States*, 968 F. Supp. 850, 863–64 (E.D.N.Y. 1997) (citing an increase in scientific research supporting the conclusion that sexual orientation can be immutable for some individuals), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." (citation omitted)), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

149. Sexual orientation has a strong correlation with an individual's personal identity, and while sexual orientation can be altered, the alteration can be devastating to the individual's self-conception. *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009).

150. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

151. *Id.* (emphasis in original).

152. Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 241–42 (1993). According to one study, "[Forty-eight] percent of the identical twin sisters of lesbians were gay, compared with just [sixteen] percent of the fraternal twin sisters of lesbians." David Tuller, *Lesbian Study of Twins Finds Genetic Link*, S.F. CHRON., Mar. 12, 1993, at A21, available at 1993 WLNR 2634880.

153. See discussion of M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1 (2009) in footnote 131 of this Essay.

154. *Conaway v. Deane*, 932 A.2d 571, 610 (Md. 2007) (outlining instances of overt discrimination against homosexuals). During the 1940s, 1950s, and 1960s, homosexuals were criminally prosecuted for any public display of affection. *Id.* Some states would sanction alcohol-purveying establishments for serving homosexuals. *Id.* "It is clear that homo-

tion that continues to result in regular “gay bashings” of fellow citizens. Indeed, the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health* specifically noted that for all intents and purposes, the discrimination homosexuals face today is of the same exact type from which African-Americans and women in our country have historically suffered.¹⁵⁵ Therefore, the second prong of the test—a history of discrimination—is not usually debated in today’s courtrooms.¹⁵⁶ But the fact that the Iowa Supreme Court in *Varnum v. Brien* sought to use the history of discrimination against homosexuals in the intelligence community as proof of the history of discrimination homosexuals must face under the first prong of the test¹⁵⁷ is, indeed, quite humorous in the context of this Essay.

D. “Discrete and Insular”

The third prong of this test concerns whether the minority in question is “discrete and insular.”¹⁵⁸ The fact that “closeted” homosexuals exist—and are an “anonymous and diffuse” group by their very nature—can potentially undercut any claim to this third prong. A prescient counter-example is that for the majority of homosexuals who are “out,” they are often found in discrete communities (current-day prejudice often forces homosexuals into the protective arms of these communities), which are necessarily insular by definition.¹⁵⁹ Generally, this test fails to capture the unique circumstances of the homosexual community, in that it is both “discrete and insular” and “anonymous and diffuse.”¹⁶⁰ A better test must be used to judge the third prong in relation to homosexuals’ right to

sexual persons, at least in terms of contemporary history, have been a disfavored group in both public and private spheres of our society.” *Id.*

155. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 433 (Conn. 2008) (citation omitted).

156. But, as the *Conaway* court explained, a finding of a history of discrimination alone does not raise the level of scrutiny to be applied. *Conaway*, 932 A.2d at 610.

157. *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009).

158. *Conaway*, 932 A.2d at 606; *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”).

159. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1809 (1996). Homosexuals face many daily hurdles that encourage them to band together in established gay networks. *Id.* The daily struggle with homosexual misrepresentations is one of the many results of the gay community having little, if any, political power. *Id.*

160. *See id.* at 1811 (analyzing the difficulty in using the “discrete and insular” test to gauge political power because of the varied descriptions used for homosexuals); *see also* Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L.

equal protection: it is a failure of law, not of the minority seeking protection.

E. Rationality

Even if we reject the above analysis, the current restrictions against homosexuals fail even the most basic rational basis test. Taken in the context of a case dealing with military intelligence (as was the case in *Watkins v. U.S. Army*, where the plaintiff was repeatedly promoted and granted security clearances despite his admitted homosexuality),¹⁶¹ the question of whether homosexuality has any rational impact on the intelligence services whatsoever must be addressed. One must recognize that it seems that restrictions against homosexuals are merely "prejudice and inaccurate stereotypes . . . [an] indicia of a classification's gross unfairness."¹⁶²

Also note that there seems to be no effect on a person's ability to contribute to society if he or she is homosexual.¹⁶³ The *Buttino* court expressly rejected previous cases dealing with this issue as being ineffective in establishing that the FBI's policy is automatically rational as a matter of law; indeed, the court suggests that the use of cases reflecting an outdated understanding of homosexuality may be an attempt to silence homosexuals through the use of precedent.¹⁶⁴ In addition to a growing realization that automatic, arbitrary discrimination against homosexuals is often *prima facie* irrational, several state courts have also started placing homosexuals in heightened classes of scrutiny for purposes of Fourteenth Amendment analysis.¹⁶⁵

VIII. CONCLUSION

My review of the history of homosexual exclusion from the military and civilian intelligence services in the United States has covered the

REV. 205, 244 (1993) (arguing that homosexuals should be regarded as a unique group requiring a different test).

161. *Watkins v. U.S. Army*, 875 F.2d 699, 701 (9th Cir. 1989).

162. *Id.* at 725 (Norris, J., concurring).

163. *Id.*

164. See *Buttino v. FBI*, 801 F. Supp. 298, 307 (N.D. Cal. 1992) (citing *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), *reh'g denied* (July 23, 1990)) ("High Tech Gays does not compel a finding (on this motion for summary judgment) that the FBI's discrimination against gays, as alleged by Mr. Buttino, is rational as a matter of law.").

165. *In re Marriage Cases*, 183 P.3d 384, 441–42 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

wide range of litigation that has occurred in an impressively short amount of time. Only since J. Edgar Hoover (rumored, ironically enough, to be a homosexual)¹⁶⁶ led the FBI in the 1950s, has this issue even been in contention. In response, the government imposed a series of restrictions and policies that largely remain in effect today.

Certainly, a great many things changed in six short decades. The status of homosexuals in society and in government has undergone a massive shift during this time. This progress (or advance of immorality, depending on one's position on the issues involved) is now occurring at an extremely rapid pace.¹⁶⁷ It seems, however, that large areas of government have remained beholden to ideas that many courts now recognize are simply outdated.

Were it just the case that the current position of the government is simply imprudent and unwise, these restrictions might be overlooked. But these policies have a clearly detrimental effect both upon the security of the United States, as well as upon the individuals affected by these rules in both the public and private spheres. While our nation is engaged in a great conflict over terrorism in many areas of the world, homosexual personnel who have expertise in these areas are being discouraged from joining the fight or are being drummed out of the battle not for their disloyalty or incompetence, but because they love the wrong person. In an age in which gays and lesbians are winning the battle for respect, the government they seek redress from seems deaf to the pleas of its own citizens.

Homosexuals have served this country honorably since its founding. In the darkest hour of the American Revolution, the country was saved by a homosexual Prussian by the name of Friedrich Wilhelm von Steuben at Valley Forge.¹⁶⁸ Homosexuals will not celebrate the election of their first president in the future, as that has possibly already occurred, and homosexuals may also celebrate those other great gay Americans in our history, one of whom (allegedly) is now celebrated on our ten dollar bill.¹⁶⁹ Homosexuals did not stop serving our country after it made clear that it

166. Frank Rich, *The Plot Against Sex in America*, N.Y. TIMES, Dec. 12, 2004, at 21, available at 2004 WLNR 13838003.

167. In fact, this Essay went through numerous revisions as a result of recent events in California, Iowa, Maine, New Hampshire, Washington, and Wisconsin.

168. WILLIAM BENEMANN, *MALE-MALE INTIMACY IN EARLY AMERICA* 97 (2006).

169. JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 451 (1976) (analyzing whether Alexander Hamilton's letters to John Laurens reveal a homosocial or homosexual relationship). The contemporary meaning of Hamilton's letters is difficult to discern because some of the language may be formal, literary convention, rather than an expression of homosexual feelings. *Id.* The author notes that even if Hamilton's language reflects no homosexual relationship, the mere permissibility of such language suggests that male-male intimacy was more accepted at that time. *Id.*

did not wish them to help—the first person injured in the recent war in Iraq was Marine Staff Sgt. Eric Alva, an openly gay man from San Antonio.¹⁷⁰

This recital of our history goes to prove one point—our country is greatly weakened by the continuing ban of homosexuals from the intelligence community, and if we are to improve our nation's security, the legal system must do that which executive orders and legislative inattention have so far failed to do.

*I have had those feelings, those longings, all of my life. It is not unnatural. I am not sick because I feel this way. I do not need to be helped. I do not need to be cured. What I need, and what all of those who are like me need, is your understanding. And your compassion. We have not injured you in any way. And yet we are scorned and attacked. And all because we are different. What we do is no different from what you do. We talk about our families and we worry about the future. All of the loving things that you do with each other—that is what we do. And for that we are called misfits, and deviants and criminals. What right do you have to punish us? What right do you have to change us? What makes you think you can dictate how people love each other?*¹⁷¹

170. Human Rights Campaign—Eric Alva: Coming Out Against Don't Ask, Don't Tell, <http://www.hrc.org/alva/> (last visited Apr. 3, 2010). On March 21, 2003, Eric Alva "was traveling in Iraq in a convoy to Basra with his battalion when he stepped on a landmine, breaking his right arm and damaging his leg so badly that it needed to be amputated." *Id.* He was subsequently awarded a Purple Heart and was then honorably discharged from the military for medical reasons. *Id.* After his discharge, Alva "came out," and has since expressed opposition to "Don't Ask, Don't Tell." *Id.*

171. *Star Trek: The Next Generation: The Outcast* (Syndicated television broadcast Mar. 16, 1992).

